

Division of Securities  
Utah Department of Commerce  
160 East 300 South  
P.O. Box 146760  
Salt Lake City, Utah 84114-6760  
Telephone: 801 530-6600

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**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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**IN THE MATTER OF:**

**KELLY T. SCOTT, CRD #2199834; and  
RETIREMENT ADVISORS**

**Respondents.**

**STIPULATION AND CONSENT  
ORDER**

**Docket No. SD-07-0031  
Docket No. SD-07-0034**

The Utah Division of Securities (“Division”) and Kelly T. Scott, CRD #2199834 (“Scott”) and Retirement Advisors (“Retirement Advisors”) (at times referred to collectively as “Respondents”) hereby stipulate and agree as follows:

1. Scott and Retirement Advisors were the subject of an examination conducted by the Division into allegations that they violated the Utah Uniform Securities Act (“Act”), Utah Code Ann. § 61-1-1, *et seq.*
2. On May 16, 2007 the Division filed a Petition to Revoke License, Bar Licensee, and Impose Fines against Scott, and an Order to Show Cause against Retirement Advisors. The Division also initiated administrative actions at that time against ING Financial Partners, Inc., CRD #2882 (“ING”), Division Docket Nos. SD-07-0032 and SD-07-0033, which actions are currently pending.

3. ING suspended Scott from engaging in any securities-related activity on June 19, 2007, pending the resolution of this matter.
4. In lieu of proceeding with the formal actions, Respondents and the Division have agreed to settle this matter by way of this Stipulation and Consent Order (“Order”). If entered, the Order will fully resolve all claims the Division has against Respondents pertaining to this matter.
5. Respondents admit the jurisdiction of the Division over them and over the subject matter of this action.
6. Respondents waive any right to a hearing to challenge the Division’s evidence and present evidence on their behalf.
7. Respondents have read the Order, understand its contents and submit to this Order voluntarily. No promises or threats have been made by the Division, nor by any representative of the Division, to induce Respondents to enter into this Order, other than as described in this Order.
8. Respondents are represented by attorney Mark W. Pugsley and are satisfied with the legal representation they have received.

#### **I. FINDINGS OF FACT**

9. Scott has been licensed in Utah as a broker-dealer agent with ING since December 24, 1996. Scott has passed the Series 6, Investment Company/Variable Contracts Limited Representative Examination, and the Series 63, Uniform Securities Agent State Law Examination. Scott has also passed the Series 65, Uniform Investment Adviser Law Examination, and has been a licensed investment adviser representative of ING since September 8, 1998. Scott was previously employed with WMA Securities, Inc.

("WMA") from December 22, 1995 until August 1, 1996, but was not licensed in any capacity. Prior to his employment with WMA, Scott was employed by InterSecurities, Inc. from December 3, 1991 until his voluntary termination on July 30, 1992, but was not licensed in any capacity.

10. ING is a Minnesota corporation located in Des Moines, Iowa, and has been a licensed broker-dealer in Utah since April 21, 1983. ING is also a federal-covered investment adviser. ING was formerly known as Washington Square Securities, Inc.
11. Educaitonal [sic] Retirement Seminars of Utah, Inc. ("Retirement Seminars") is a Utah registered corporation. Scott is Retirement Seminars' director and registered agent.
12. Scott also conducts business using the assumed name "Retirement Advisors," which name is a registered "dba" with the Utah Department of Commerce. Retirement Advisors is the name and logo on Scott's business cards, which promote it as "Independent Retirement Advising." Scott is the registered agent of Retirement Advisors.

#### **Senior Seminar Sales Presentations**

13. On April 18 and April 19, 2006, Scott presented three "free" 'Wealth Advantage Financial Retirement Workshops by Educational Retirement Seminars, Inc.' at the Davis Conference Center in Layton, Utah. Seminar invitations indicated that the seminars would be "presented by a licensed, qualified instructor."
14. A Division employee attended Scott's afternoon presentation on April 18, 2006.
15. The seminar targeted seniors and touted Scott as a "true blue independent."

#### **Unapproved Seminar Materials**

16. The invitations mailed by Scott claimed the seminar is "Utah's Number One and Most Informative Retirement Course!" This statement was not included in the seminar

invitation that was approved by ING.

17. The invitation included an enclosure card that described Scott as “Your Workshop Instructor.” The enclosure card was not included in the invitation materials that were approved by ING.
18. During the seminar, Scott gave seminar attendees a map with directions to his office. Centered in bold at the bottom of the page is, “INDEPENDENT RETIREMENT ADVISING”. This document was likewise not approved by ING.

**Failure to Disclose and Misrepresentations**

19. Much of Scott’s presentation focused on variable annuities with minimum guaranteed income benefit (“MGIB”) riders that “guarantee” a seven percent (7%) return.
20. Scott misrepresented and omitted material facts during the seminar including, but not limited to, the following:
  - (a) Scott failed to disclose that his seminar was a sales presentation designed to gain additional clients and commissions for ING and Scott, rather than the educational course he claimed it to be;
  - (b) Scott failed to disclose that: i) the guaranteed seven percent is used for calculating the annuity contract owner’s guaranteed minimum income only; and ii) the seven percent figure does not become the contract value;
  - (c) Scott failed to disclose that the seven percent income benefit has a cap of three times the initial premium or the contract value when the investor reaches age 80, whichever occurs first;
  - (d) Scott misrepresented that MGIBs are “great” whether “you’re 50 or whether you’re 80” when in fact, the variable annuities with MGIBs that Scott sells are not

available to investors who are 75 or older;

- (e) Scott failed to disclose that investors should carefully review an offering insurance company's rating before purchasing a variable annuity and instead stated that the insurance companies that offer the MGIBs are "among the largest companies in the world" and that if these companies went out of business, investors "would already see some very bad things in the world today...banks and...many other insurance companies would have already run out";
- (f) Scott misrepresented that all fifty state insurance departments have "signed off" on or approved of the MGIBs;
- (g) Scott failed to disclose the significant commissions involved in the purchase of a variable annuity. He instead represented that the insurance companies "don't charge you any commission to get into [the variable annuities with MGIBs];"
- (h) Scott misrepresented that if an investor faces a penalty to move moneys from a CD or existing annuity, when the investor switches to one of the companies Scott pitched, the company will pay the penalty "in full;"
- (i) Scott failed to adequately disclose the fees and costs associated with MGIBs and instead represented that "[i]t's absolutely nothing to get into [variable annuities with MGIBs]";
- (j) Scott misrepresented that his clients are not charged "one cent" for purchasing an MGIB;
- (k) Scott misrepresented that every mutual fund Scott's clients have in the sub-accounts of their variable annuities are among the top 1% of mutual funds in the nation;

- (l) Scott misrepresented that the “big” firms such as “Morgan Stanley Dean Witter, Merrill Lynch, Salomon Smith Barney, American Express, D.A. Davidson” do not recommend or sell the top 1% of mutual funds in the nation;
- (m) Scott misrepresented that he is a “true blue independent” and that he therefore is better able to find and recommend the best funds and the best variable annuities;
- (n) Scott failed to disclose that in fact, he may only sell ING-approved products, and that a significant majority of his business as a “true blue independent” comes from the sale of ING variable annuities; and
- (o) Scott misrepresented that no matter what funds and annuities he sells, his firm, ING, gets the same commission.
- (p) Scott misrepresented that Retirement Advisers is an investment adviser, stating that providing investors alternatives without charging clients anything is the mission statement of Retirement Advisors, and that this mission statement “has made Retirement Advisors a very big financial planning firm across the Wasatch Front.”

The above statements are false or omit material facts necessary to make such statements not misleading.

#### **Scott’s History of Misleading Seminars**

- 21. Prior to the 2006 seminars, ING was advised by the Division that Scott had conducted potentially misleading seminars.
- 22. On February 12, 2004, in response to an inquiry by the Division, ING wrote the Division a letter stating:

Since the seminar material was not used in the manner that it was designed

or approved for use by ING Financial Partners, Inc., no written approval for that specific seminar exists. The materials presented by Mr. Scott were a selection of slides from approved seminars available for use with the public. The information presented by Mr. Scott could have included approved materials from previous years and was therefore not current and not complete...The seminars are intended to be presented over several meetings, and an isolated exposure to the seminar may not accurately portray the breadth of information being presented.

23. The letter also acknowledged that Scott had violated ING's policies by using an unapproved business card that stated Scott was a "Retirement Specialist." In the same letter, ING represented that it would take disciplinary action against Scott. However, in 2006, ING acknowledged there had been no disciplinary action.

### **Customer Complaints**

24. The Central Registration Depository ("CRD")<sup>1</sup> shows five customer complaints against Scott, four of which were made by seniors who alleged Scott misled them when he sold them variable annuities. In addition, three other senior investors, R.W., B.H. and G.A., made similar allegations which were not reported on CRD. The allegations were, among other things, that Scott guaranteed the investors they could not lose their money, guaranteed them six to seven percent per annum interest, and assured them that when they purchased new variable annuities from him, they would receive "bonuses" to cover any surrender charges they incurred on their existing variable annuities.
25. Most, if not all, of these investors met Scott after attending one of his seminars (or "educational courses" as Scott, ING and the investors refer to the seminars.)
26. Although two of the senior complaints were settled, in four other cases involving seniors

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<sup>1</sup>CRD is a computerized database maintained by the Financial Industry Regulatory Authority ("FINRA"). CRD contains employment, licensing and disciplinary information on broker-dealers, agents, investment advisers, and investment adviser representatives.

C.W., D.G., B.H. and R.W., the complaints were denied by ING or its predecessor, stating the investors had received the prospectus and signed all the required documents to purchase the variable annuities. G.A.'s complaint was not treated as a complaint but only as a customer inquiry.

27. The one non-senior customer filed an arbitration action against ING and Scott and the matter was settled for \$55,000.

## **II. CONCLUSIONS OF LAW**

28. Scott violated Section 61-1-1(2) of the Act by misrepresenting and omitting material facts when he gave his sales presentation to potential investors, as described in paragraph 20 above.
29. Scott violated Section 61-1-1(3) of the Act by using unapproved seminars, advertising and sales materials, which contained misrepresentations to potential clients, his broker-dealer and investment adviser. This conduct constituted an act, practice or course of business which operated as a fraud upon potential clients and ING, and exposed ING to potential liability.
30. Scott further engaged in an act, practice or course of business which operated as a fraud in violation of Section 61-1-1(3) by using seminars purporting to be educational in nature but which were really sales presentations for the purposes of gaining new clients and selling products.
31. Scott engaged in dishonest and unethical practices, warranting sanctions under Section 61-1-6(2)(g) of the Act, by:
- (a) using advertising or a sales presentation in such a fashion as to be deceptive or misleading, as proscribed by Utah Admin. Code Rule R164-6-1g(C)(18),



applicable to agents through (D)(7); and

- (b) using unapproved and misleading seminars, advertising, and sales materials, in violation of NASD Conduct Rule 2210, which constitutes a dishonest or unethical practice under Utah Admin. Rule R164-6-1g(C)(28), applicable to agents through (D)(7).

- 32. Retirement Advisors, through advertising materials and representations made by Scott, held itself out as an investment adviser, without being licensed as an investment adviser, in violation of Section 61-1-3(3) of the Act.

### **III. ADMISSIONS**

- 33. For purposes of this Order only, Scott admits:
  - (a) a pattern of inadequate compliance and record keeping; and
  - (b) that portions of the advertising of his seminars and his statements and conduct at the seminars were misleading.

### **IV. REMEDIAL ACTIONS/SANCTIONS**

- 34. With the exception of the Admissions contained in Section III, Scott and Retirement Advisors neither admit nor deny the Division's findings and conclusions, but consent to the Division entering an Order requiring the following remedial action and sanctions:
  - (a) Scott will pay a fine of \$100,000 within thirty (30) days of entry of this Order.
  - (b) Scott will hold no more securities-related seminars of any nature.
  - (c) Scott will cease using the name "Retirement Advisors" and will not use any other name that suggests that his business is other than the sales of insurance and mutual funds. He will not use any names that suggest anything other than being a sales agent for ING (or another broker-dealer) and insurance companies.

- (d) Scott shall cease making claims of “independence.”
- (e) Scott will not sell or promote variable annuities. If any existing or potential client approaches him requesting to purchase a variable annuity, he will refer such persons to appropriate representatives. He will not share in any compensation resulting from any such sales.
- (f) Scott will withdraw his investment adviser representative registration within 30 days following entry of this Order.
- (g) Scott will requalify as a broker-dealer agent by taking and passing the Series 6 and 63 examinations within 120 days of the entry of this Order. If Scott fails to pass the examinations by that date, he is precluded from acting in the capacity of a broker-dealer agent until such time as he passes the examinations.
- (h) Scott will not recommend or participate in the sale of any equity or debt securities if he does not hold a Series 7 license. This prohibits any recommendation that a customer ask the customer’s current broker-dealer to liquidate any security held by the customer where the security requires a Series 7 license to be bought or sold.
- (i) In any meeting or discussion with clients at which there is any discussion of equities or securities requiring a Series 7 license to be bought and sold, Scott will disclose to the customers that he is not licensed to sell stocks or other securities requiring a Series 7 license, and cannot give any advice about the wisdom of buying, keeping, or selling such securities.
- (j) Following Scott’s requalification by examination as set forth in subparagraph h., above, Scott will send a letter, approved by the Division, to all customers who

have purchased a variable annuity through him within the past four years after first being introduced to him through a seminar. The letter shall inquire as to whether at the time of purchase the customer adequately understood the holding period, expenses, fees, commissions, and other product characteristics, and whether the product is as Scott represented it at the time of purchase. Customer responses to the letter shall be sent directly to counsel for Scott, and copies will be provided to the Division. For those customers who wish to rescind their purchase, Scott shall offer to cover any contingent deferred sales charge (“CDSC”) expenses<sup>2</sup> and/or surrender fees associated with rescinding the transaction. The rescission will be handled through his broker-dealer, and Scott will pay any of the costs that might be imposed on the customers (to the extent the issuers will not waive the CDSC or the broker-dealer will not pay the expenses).

- (k) For outstanding verbal or written customer complaints, the prior complaints of C.W., D.G., R.W., B.H. and G.A., described above in paragraphs 24-26, and those received in the future regarding past seminar conduct or variable annuity sales, Scott will reevaluate those complaints and do one of the following:
  - i. Reach a settlement agreement acceptable to the complainant;
  - ii. Refer the complaint to an independent person, not affiliated with Scott or ING (and who is acceptable to the Division) for an independent recommendation of what amount, if any, should be paid to the complainant. Scott will, through

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<sup>2</sup>A CDSC is a back-end charge imposed when selling a security owned by the investor. It is common with variable annuity products and typically declines until eliminated after a specific period of time, generally seven to ten years.

his broker-dealer, pay that amount to the complainant; or

iii. Have the Division determine what an appropriate amount, if any, should be.

Scott will pay such amount to the complainant.

- (m) For a period of three years from the date of this Order, Scott will promptly provide to the Division a copy of all written customer complaints and a written summary of any customer complaints that might be expressed orally. He will notify the Division at least quarterly of the status of those complaints and what has been done to resolve them.
- (n) If, during the next three years, any internal audit by his broker-dealer or any examination by the Division or FINRA notes a recurrence of significant compliance problems that have been noted in previous inspections, or finds a significant violation of other regulatory requirements, Scott agrees that he will voluntarily surrender his securities license. This will be subject only to the Division's responsibility to establish that the new deficiency is either a significant violation or that it is a significant matter about which Scott has previously been warned. Under such circumstances, a hearing will be held on an expedited basis for the limited purpose of the Division establishing that the violation is significant.
- (o) If Scott is found to have materially breached any term of this agreement, Scott will voluntarily surrender his securities license and be barred from associating with a broker-dealer or investment adviser licensed in Utah.
- (p) If new customer complaints filed within the next three years (or information otherwise coming to the attention of the Division) indicate a repetition, after entry

of this Order, of any of the type of conduct that is a basis of this Order and the Division initiates a new disciplinary action based on the new allegation:

- i. Scott's admissions in this Order will be admissible in the new proceeding as to a pattern of prior conduct and as to the public interest in whether he should retain his license; and
- ii. The prior allegations of misconduct in this Order can be realleged as grounds for the new action.

(q) Scott will complete eight continuing education programs in the year following entry of this Order. At least four programs must be on ethics and at least four programs on advertising, compliance, and record keeping. Two programs will be taken each quarter.

35. The Division and Scott further agree that after three (3) years following entry of this Order, Scott may approach the Division to modify the limitations set forth in this Order. The Division shall retain full discretion, however, to grant or deny such request.

#### **V. FINAL RESOLUTION**

36. Scott and Retirement Advisors acknowledge that this Order, upon approval by the Division Director and Securities Advisory Board shall be the final compromise and settlement of this matter. Respondents further acknowledge that if the Division Director and Securities Advisory Board do not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever. Respondents acknowledge that the Division Director has been involved in some of the investigation and negotiations leading to this Order and waive any conflicts of interest that might otherwise preclude him from signing this Order.

37. Respondents acknowledge that the Order does not affect any civil or arbitration causes of action that third-parties may have against them arising in whole or in part from their actions, and that the Order does not affect any criminal cause of action that a prosecutor might bring.
38. This Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Order in any way.

Utah Division of Securities

Date: October 16, 2007

By: Wayne Klein  
Wayne Klein  
Director

Date: 10-3-07

By: Kelly T. Scott  
Kelly T. Scott

Retirement Advisors

Date: 10-3-07

By: Its. President  
Its. President

Approved:

D. Scott Davis  
D. Scott Davis  
Assistant Attorney General

Approved:

Mark W. Pugsley  
Mark W. Pugsley  
Counsel for Respondents

## ORDER

IT IS HEREBY ORDERED THAT:

1. The Division has made a sufficient showing of Findings of Fact and Conclusions of Law to form a basis for this settlement.
2. Scott has admitted a pattern of inadequate compliance and record keeping, and that portions of the advertising of his seminars and conduct at his seminars was misleading.
3. Scott requalify as a broker-dealer agent by taking and passing the Series 6 and 63 examinations within 120 days of the entry of this Order. If Scott fails to pass the examinations by that date, he is precluded from acting in the capacity of a broker-dealer agent until such time as he passes the examinations.
4. Scott pay a fine of \$100,000 within thirty (30) days of entry of this Order.
5. Scott implement the remedial actions described in Section IV, above.
6. Scott comply with the requirements of the Utah Uniform Securities Act in all future business in this state.

DATED this 16<sup>TH</sup> day of October, 2007.

  
WAYNE KLEIN

Director, Utah Division of Securities



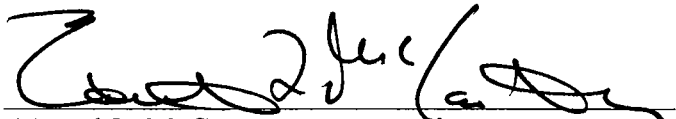
**BY THE UTAH SECURITIES ADVISORY BOARD:**

The foregoing Order is hereby accepted, confirmed and approved by the Utah Securities  
Advisory Board.

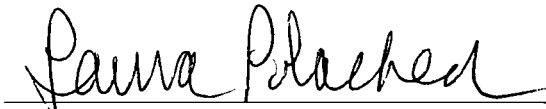
DATED this 16th day of OCTOBER, 2007.



Tim Bangerter



Edward L. McCartney



Laura Polacheck

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Mark W. Pugsley

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Craig Skidmore

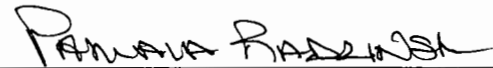


**CERTIFICATE OF MAILING**

I hereby certify that on the 17th day of October 2007, I mailed, by certified mail, a true and correct copy of the forgoing **Stipulation and Consent Order** to:

Mark W Pugsley  
Ray Quinney & Nebeker  
36 South State Street Ste 1400  
Salt Lake City, UT 84111

CERTIFIED MAIL: 7005 1820 0003 7190 6359



Executive Secretary